YEAP HOCK SENG @ AH SENG v. MINISTER FOR HOME AFFAIRS, MALAYSIA & ORS.

[Cr. App. (Abdoolcader J.) October 28, 1975]
[Ipoh — Criminal Application No. 20 of 1975]

Habeas Corpus — Right to — Mala Fides — Preventive detention — Emergency (Public Order & Prevention of Crime) Ordinance, 1969, ss. 4(1), 5(2)(a) & (b) — Criminal Procedure Code (F.M.S. Cap. 6), ss. 302 & 365 — Fundamental right — Federal Constitution, arts. 5(2), 7(2).

Constitutional Law — Fundamental rights — Habeas Corpus — Right to — Federal Constitution, arts. 5(2) & 7(2).

Administrative Law — Habeas Corpus — Right to — Mala Fides — Federal Constitution, arts. 5(2) & 7(2).

Judicial Precedent — Observations on relevance and authoritative value of Indian decisions.

The applicant alleged unlawful detention and applied for a writ of *habeas corpus*. He was arrested on March 27, 1975 at Kuala Kurau together with 5 others on suspicion of having committed murder, and on April 16, 1975 they were produced before the Magistrate, Parit Buntar, and tentatively charged with murder of two male Chinese contrary to section 302 of the Penal Code. The preliminary enquiry was fixed for June 23, 1975 but on that date the prosecution sought an adjournment. The enquiry was accordingly adjourned to August 13, 1975 when the prosecuting officer again sought an adjournment for a further week. On August 20, 1975 the prosecution informed the magistrate that he was directed by the Deputy Public Prosecutor to request the court to grant a discharge to the applicant and the others, whereupon the magistrate discharged all of them.

As the applicant walked out of the court-house he was immediately apprehended and taken to Barit Buntar Police Station where the order of detention made against him by the Minister under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, and the grounds and allegations of fact were read and explained to and served on him. The detention order was dated August 12, 1975 and recited that whereas the Minister was satisfied that it was necessary to make the order in respect of the applicant for the purpose of preventing him from acting in any manner prejudicial to public order or for the suppression of violence or the prevention of crimes involving violence, in exercise of the powers conferred upon him by section 4(1) of the Ordinance he thereby directed that by the order the applicant be detained for a period of two years from August 13, 1975. The statement of grounds and allegations of fact was dated August 13, 1975.

The applicant contended that he had been unlawfully detained under section 4(1) of the Ordinance, that the detention order was null and void and in breach of the provision of articles 5 & 7 of the Constitution, and that the Ordinance was promulgated for certain specific purposes and not applicable to loyal citizens like him. He further affirmed that he was not a person who acted or would act in any manner prejudicial to public order or resort to violence, and categorically denied the allegations contained in the statement of grounds and allegations of facts on which the order was made and based.

Held: (1) the grant of *habeas corpus* is as of right and not in the discretion of the court in the circumstances of a fundamental right guaranteed by the Constitution being involved and section 365 of the Criminal Procedure Code (F.M.S. Cap. 6) must now therefore be read in this light and as modified accordingly by the application of the provisions of article 162(6) of the Constitution;

(2) a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute. The existence of an alternative remedy, however convenient, beneficial and effectual does not prevent the issue of a writ of *habeas corpus* and it is open to the court notwithstanding to examine the legality of the impugned detention;

(3) in this case, the applicant was not precluded from making this application at this stage notwithstanding his right to make and the pendency of such representations to an Advisory Board under the Ordinance;

(4) the order of detention made by the Minister in respect of the applicant in the circumstances of this matter does not *ipso facto* amount to the exercise of his powers under section 4(1) of the Ordinance for ulterior purpose or purposes other than that mentioned in the detention order so as to vitiate and render it *mala fide*. The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *mala fides* and not mere suspicion;

(5) the object and ambit of the Ordinance is such and the purposes specified in section 4(1) are so wide as to negate any right in the applicant in the circumstances of his case to demand that the grave question of his guilt or innocence on the tentative charge of murder should be left to the court and the jury-box as the sanctuary of his life and liberty and not submerged in the amplitude of preventive detention on the basis of executive discretion and satisfaction within the purview of the prescribed statutory provision on relevant grounds;

(6) mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purpose;

(7) the prerequisite for a valid detention order is ministerial satisfaction under section 4(1) of the Ordinance and the fact that the statement in writing required to be furnished to the detenu under section 5(2)(b) is dated a day later than the order of detention cannot impair the validity of the order otherwise properly made or embase it for bad faith;

(8) where an order of detention is challenged on the ground of *mala fides*, what has got to be made out is not the want of *bona fides* on the part of the police, but the want of *bona fides* as well as the non-application of mind on the part of the detaining authority;

(9) there has in the circumstances been no breach of article 7(2) of the Constitution nor does it affect the position in any way;

(10) in this case the applicant had been legally detained by a valid detention order made by the Minister in the exercise of his powers under the provisions of section 4(1) of the Ordinance and the detenu had failed to establish that it was tainted with *mala fides* or made improperly.

Cases referred to:-

(1) *Estep* v. *United States* (1946) 327 U.S. 114, 141.
(2) *R.* v. *Pell & Offly* 84 E.R. 720.
(3) *State ex rel. Evans* v. *Broaddus* 245 Mo. 123, 140.
(4) *State of Bombay* v. *United Motors (India) Ltd.* A.I.R. 1953 S.C. 252.
(5) *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh* A.I.R. 1954 S.C. 403.
(6) *Prem Dutta Paliwal* v. *Superintendent, Central Prison, Agra* A.I.R. 1954 All 315.
(7) *Kharak Singh* v. *State of Uttar Pradesh* A.I.R. 1963 S.C. 1295.
(8) *Regina* v. *Governor of Pentonville Prison, Ex parte Azam* [1974] A.C. 18, 24-49, 58-75.
(9) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129, 136.
(10) *Sadhu Singh* v. *The Delhi Administration* A.I.R. 1966 S.C. 91.
(11) *Liversidge* v. *Anderson* [1942] A.C. 206.
(12) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284.
(13) *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 M.L.J. 92.
(14) *Gitendranath Ghosh* v. *Chief Secretary to the Government of Bengal* I.L.R. 60 Cal. 364, 376.
(15) *Ashutosh Lahiry* v. *State of Delhi* A.I.R. 1953 S.C. 451.
(16) *Thakur Prasad Bania* v. *State of Bihar* A.I.R. 1955 S.C. 631.
(17) *Priyatosh Mazumdar* v. *State of West Bengal* A.I.R. 1963 Cal. 589.
(18) *Sahib Singh Dugal* v. *Union of India* A.I.R. 1966 S.C. 340.

(19) *Rameshwar Shaw* v. *District Magistrate, Burdwan* A.I.R. 1964 S.C. 334.
(20) *Masood Alam* v. *Union of India* A.I.R. 1973 S.C. 897.
(21) *Debu Ghose* v. *State of West Bengal* A.I.R. 1972 S.C. 530.
(22) *Mohd. Salim Khan* v. *Shri C.C. Bose* A.I.R. 1972 S.C. 1670.
(23) *Borjahan Gorey* v. *State of West Bengal* A.I.R. 1972 S.C. 2256.
(24) *S.C. Bose* v. *District Magistrate, Burdwan* A.I.R. 1972 S.C. 2481.
(25) *Mohd. Subrati* v. *State of West Bengal* A.I.R. 1973 S.C. 207.
(26) *Sri Ramayan Harijan* v. *State of West Bengal* A.I.R. 1973 S.C. 758.
(27) *Abdul Aziz* v. *District Magistrate, Bardwan* A.I.R. 1973 S.C. 770.
(28) *King-Emperor* v. *Sibnath Banerji* A.I.R. 1945 P.C. 156.
(29) *Lawrence D'Souza* v. *State of Bombay* A.I.R. 1956 S.C. 531.
(30) *Public Prosecutor* v. *Syed Abdul Bahari Shahabuddin bin Syed Abdullah* Ipoh High Court Crim. Rev. No. 12 of 1975.
(31) *Raman Lal Rathi* v. *Commissioner of Police, Calcutta* A.I.R. 1952 Cal. 26.
(32) *Dharamdas Shyamlal* v. *District Magistrate, Ahmedabad* A.I.R. 1960 Guj. 43.
(33) *In Re Michael Walsh, et al.* [1942] I.R. 112.

APPLICATION FOR *HABEAS CORPUS.*

R. Rajasingam for the applicant.

Abdullah bin Ngah (Senior Federal Counsel) for the respondents.

Abdoolcader J.: Yeap Hock Seng who rejoices in the euphonious hypocorism of Ah Seng on a motion returnable and heard 5 days ago seeks redress in this court for what he alleges to be illegal restraint of his person and unlawful deprivation of his liberty by way of a writ of *habeas corpus* (obviously the highest species of this historic constitutional remedy — *ad subjiciendum et recipiendum*) under the provisions of Article 5(2) of the Federal Constitution which writes the already existing remedy of *habeas corpus* into the Constitution and section 365 of the Criminal Procedure Code (F.M.S. Cap. 6), naming as respondents the Minister for Home Affairs, Malaysia, (the detaining authority), the Senior Superintendent, Detention Camp, Pulau Jerejak, Penang, (the officer in charge of the detention centre where he is now detained) and the Chief Police Officer, Perak, (the arresting authority).

The affidavits filed disclose that the applicant, a Malaysian citizen, was arrested on March 27, 1975, at Kuala Kurau, Perak, together with five other persons on a suspicion of having committed murder, and on April 16, 1975, the six of them, apparently together with another male Chinese who had been arrested on April 2, 1975, on suspicion of the same murder, were produced before the Magistrate's Court, Parit Buntar, Perak, and tentatively charged with committing murder on March 27, 1975, by intentionally causing the death of two male Chinese, an offence punishable under section 302 read together with section 34 of the Penal Code.

The preliminary enquiry into this charge was fixed for June 23, 1975, but on that date the prosecution sought an adjournment on the ground that investigations had not been completed. The enquiry was accordingly adjourned to August 13, 1975, when the prosecution again sought an adjournment for a further week. On August 20, 1975, the prosecuting officer informed the presiding magistrate that the case was a complicated one and needed further investigation and that he was directed by the Deputy Public Prosecutor to request the court (obviously for lack of evidence) to grant a discharge to the applicant and the other six accused persons, whereupon the magistrate discharged all the seven of them.

It would then appear that as the applicant walked out of the court-house he was immediately apprehended (and indeed so were the other six) and taken to the Parit Buntar Police Station where Inspector V. Doraisamy read and explained to him through an interpreter in the Hokkien dialect the order of detention made against him by the Minister under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("the Ordinance"), the requisite statement under section 5(2)(b) of the grounds on which the order was made and the allegations of fact on which the order was based, the notification of his right of representation to an Advisory Board under section 5(2)(a) and a form for making representations under section 5(1), and gave him copies of the order, the statement, two notifications of his right of representation and the requisite form for making such representations, which the applicant acknowledged receiving and confirmed understanding the contents thereof. The applicant was then taken to Pulau Jerejak, Penang, and detained at the Detention Camp there.

The detention order under the hand of the Minister is dated August 12, 1975, and recites that whereas he is satisfied that it is necessary to make the order in respect of the applicant for the purpose of preventing him from acting in any manner prejudicial to public order or for the suppression of violence or the prevention of crimes involving violence, in exercise of the powers conferred upon him by section 4(1) of the Ordinance he thereby directs that by the order the applicant be detained for a period of two years from August 13, 1975, at the Detention Camp, Pulau Jerejak, or any other centre as directed by him from time to time.

The statement under section 5(2)(b) is dated August 13, 1975, and reveals the grounds on which the order was made to be that the applicant is an active member of a group of inshore fishermen at Kuala Kurau, Perak, and has taken part in criminal activities involving violence in a manner prejudicial to public order. The allegations of fact on which the order was based are that the applicant is an active member of a group of inshore fishermen and has taken part in several fights with trawler fishermen, in which on March 27, 1975, two trawler fishermen were killed.

The applicant contends that he has been unlawfully detained under section 4(1) of the Ordinance, that the detention order made by the Minister is null and void and in breach of the provisions of Articles 5 and 7 of the Constitution, and that the Ordinance was promulgated for certain specific purposes and not applicable to loyal citizens like him. He further affirms that he is not a person who has acted or would act in any manner prejudicial to public order or resort to violence, and categorically denies the allegations con-

MLJ 2005

tained in the statement of grounds and allegations of fact on which the order was made and based.

I would add that five other co-accused of the applicant arrested on the same charge of murder and then discharged and detained in the same manner have also filed identical applications for *habeas corpus*.

At the outset of his submission counsel for the applicant raised two technical objections to the detention order and the statement of the grounds and allegations of fact but later, in my view quite sensibly, abandoned them, and it is therefore not necessary to refer or deal with these as in any event I find no substance in the points raised.

I am constrained to observe at this point that, to my sorrow and surprise, counsel on both sides frankly admit they are unable to find or cite any authority whatsoever, persuasive or otherwise, for their respective cases on the two issues arising in this matter, namely, the right to *habeas corpus* at this stage and the matter of *mala fides* in the circumstances of this case. It therefore devolves upon me, in the fashion of the ancient Greek philosophers who had to delve into the unknown, to discover and deal with such relevant precedents as there are to unravel and resolve the questions posed. I regret therefore that counsel who argued this case would probably not recognise substantial parts of this judgment as having any relation to the submissions they addressed to me.

As it will be necessary to discuss certain Indian cases in the course of my judgment, I should perhaps at this stage deal with the relevance and authoritative value of such decisions. Our Constitution and the laws providing for preventive detention have been primarily drawn from Indian sources, and accordingly decisions of the highest tribunal in India, the Supreme Court of India, and indeed also of the High Courts of her several States, are of great persuasive authority here upon the borrowed provisions and will be entitled to great weight in interpreting and considering the relevant local statutory counterparts, subject of course to such modifications as may be necessary owing to variation in language or context. The position would therefore appear to be that where there is a dearth of local authority, the Indian decisions are entitled to the greatest respect and will normally be followed unless the court has cause to disagree with the reasoning of any such decision.

The first point to consider is the submission of Senior Federal Counsel appearing for the respondents that an application for *habeas corpus* at this stage is premature and precluded by the availability of the prescribed remedy provided by the Ordinance itself and, indeed, by Article 151 of the Constitution, for the detenu to have recourse to an Advisory Board in the light of the provisions of section 365 of the Criminal Procedure Code. A consideration of this contention must, it seems to me, entail an examination of the nature and scope of a writ or order in the nature of *habeas corpus*.

The court must never, in my view, lose sight of the fact that a detention order made under section 4(1) of the Ordinance results in the deprivation of freedom without trial and constitutes a serious transgression upon the fundamental right of liberty of the person.

Habeas corpus is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for the detention is legally valid, in the sense that it is pursuant to valid statutory authority, and to test whether the detention proceedings are, in the words of Frankfurter J. in *Estep* v. *United States*[1] "a mere sham, nothing but an empty form."

The grant of *habeas corpus* is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and *mandamus*. It is a writ of right against which no privilege of person or place can be of any avail (*R.* v. *Pell And Offly*[2]). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel. Evans* v. *Broaddus*[3] that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

Such then is the purpose and power of this great writ of liberty that I am impelled to the view that the principles governing the exercise of the court's discretion and the rules pertaining to the existence of alternative remedies in granting *mandamus*, prohibition and *certiorari* should not apply to *habeas corpus*. My conclusion in this respect is not inhibited or affected by the judicial discretion provision in section 365 of the Criminal Procedure Code that "The High Court *may whenever it thinks fit* direct —" and certain Indian decisions on the like provision in section 491 of the former Indian Criminal Procedure Code (now replaced by the Indian Criminal Procedure Code, 1973 which omits this section), in view of the fact that the complaint now made by the applicant purports to be one of a breach of his fundamental right of personal liberty under the Constitution and this application must of necessity be made both under the procedural provisions of the Criminal Procedure Code and Article 5(2) of the Constitution which must be read together with its enforcement provision enacted in section 25(2) and paragraph 1 of the Schedule to the Courts of Judicature Act, 1964. Section 365 of the Criminal Procedure Code must now therefore be read, in my view, in this light and as modified accordingly by the application of the provisions of Article 162(6) of the Constitution.

In *State of Bombay* v. *United Motors (India) Ltd.*,[4] the Supreme Court of India held that the principle that a court will not issue a prerogative writ when an adequate alternative remedy was available would not be applied where a party came to the court with an allegation that his fundamental rights had been abridged. This decision was followed and applied by the Supreme Court in *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh*.[5]

The High Court of Allahabad held in *Prem Dutta Paliwal* v. *Superintendent, Central Prison, Agra*[6] that the fact that the Constitution has provided for an Advisory Board for advising on cases of preventive

detention does not mean that the right of the High Court to grant a writ of *habeas corpus* in cases where the initial arrest was illegal or improper has been taken away, and that the provision in the detention law and the Constitution for an Advisory Board does not constitute it a court of law or impose on it the duty of determining whether a person's detention is legal.

In *Kharak Singh* v. *Uttar Pradesh*[7] the Supreme Court decided that it is wholly erroneous to assume that before its jurisdiction under Article 32 of the Constitution of India could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of the court that by executive action the fundamental right of a petitioner has been infringed, it is not only the right but the duty of the court to afford relief to him by passing appropriate orders in that behalf.

In the recent English Court of Appeal decision in *Regina* v. *Governor of Pentonville Prison, Ex parte Azam*[8] (at pages 24-49), which was affirmed by the House of Lords *sub nomine Azam* v. *Secretary of State for the Home Department*[8] (*ibid* at pages 58-75), the Court of Appeal unanimously held that a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute. Although in that case the illegal entrant would only have been in a position to appeal after he had been removed from the United Kingdom and presumably after he had got back to his homeland, that does not, in my view, detract from the principle laid down by Lord Denning M.R. and Buckley and Stephenson L.JJ., to the effect that the existence of an alternative remedy, however convenient, beneficial and effectual, does not prevent the issue of a writ of *habeas corpus* and that it is open to the court notwithstanding to examine the legality of the impugned detention.

I wholly agree with these decisions in this respect and am further fortified in my view by the fact, as I have stated earlier, that the applicant is alleging a breach of his fundamental right of personal liberty. I accordingly hold that he is not precluded from making this application at this stage notwithstanding his right to make and the pendency of such representations to an Advisory Board under the Ordinance.

It is, of course, settled law that the subjective determination of the Minister is not justiciable (*Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*;[9] *Sadhu Singh* v. *The Delhi Administration*[10]). The courts have consistently declined to review the exercise of ministerial discretion when its validity is impugned in *habeas corpus* proceedings (*Liversidge* v. *Anderson*;[11] *Greene* v. *Secretary of State for Home Affairs*[12]). The court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded but can examine the grounds disclosed by the Minister to see they are relevant to the object which the Ordinance prescribes. In proceedings such as these the court does not sit in appeal against the decision of the Minister regarding materials on which the detention order was made. The court does not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion.

The burden of proving lawful justification for the detention lies on the respondents. This they do by relying on the detention order which must be made in the exercise of a valid legal power, in this case section 4(1) of the Ordinance. Once this is shown it is for the detenu to show that the power was exercised *mala fide* or improperly for a collateral or ulterior purpose in *fraudem legis* (*Karam Singh*;[9] *Aminah* v. *Superintendent of Prison, Pengkalan Chepa, Kelantan*[13]). The concept of subjective satisfaction of the Minister would be a sufficient justification for the detention unless the detenu can show that the power vested in the Minister to make the order with regard to him has been exercised *mala fide* or improperly — resolving into a position so felicitously put by Remfree J., in *Gitendranath Ghosh* v. *Chief Secretary to the Government of Bengal*[14] to the effect that "although the forms of law have been observed there has been a fraud upon the Act or an abuse of the powers given by the Legislature."

The crunch of the applicant's contention in this case is that the exercise of the powers of detention by the Minister under section 4(1) of the Ordinance is *mala fide* and improper and no less than a ruse to circumvent the provisions of the ordinary criminal law embodied in the Penal Code when his prosecution on the tentative charge of murder was abandoned and substituted by the detention order and that in the circumstances his detention is punitive and not preventive. The applicant in fact in his affidavit in support of his application alleges bad faith against the Chief Police Officer, Perak, the third respondent herein, and the police generally in completely disregarding and circumventing the rule of law and the Constitution in advising the Minister on his detention in the circumstances of his initial arrest on the tentative charge of murder preferred against him, his subsequent discharge and his consequent detention under the Ordinance.

The question for determination therefore resolves into whether the applicant's detention culminating as an aftermath in these circumstances is in effect a *mala fide* and improper exercise of the powers of detention vested in the Minister under section 4(1) of the Ordinance. There does not seem to be any local authority on this point and both counsel agree that this question is *res integra* in Malaysia but there are some pertinent Indian decisions which I shall proceed to discuss.

In *Ashutosh Lahiry* v. *State of Delhi*,[15] a decision of the Supreme Court of India, the petitioner had been detained under preventive detention because he had given highly provocative speeches of a communal nature, one of which had resulted in a riot in Delhi. Noting that the petitioner could have been tried for violating provisions of the ordinary criminal law, Mukherjea J., observed *obiter* (in a *dictum* unwarrantedly wide, in my view, in using the word 'proof') that "there could be no better proof of *mala fides* on the part of the executive authorities than a use of the extraordinary provisions contained in the (Preventive Detention) Act for the purposes for which ordinary

law is quite sufficient," but he added (and Das J., in his judgment held to the same effect) that this was mere suspicion which could not and did not however amount to proof. The Supreme Court could not grant *habeas corpus* in that case because the only way to do so would have been by proving *mala fides* on the part of the Government which could only in the circumstances be suspected but could not be taken for granted or sufficiently proved by the petitioner. This decision shows that in spite of the obvious circumvention of the ordinary procedure of law against the detenu, the Constitution and the preventive detention laws did not provide any legal remedy against the misuse of the extraordinary powers of preventive detention.

In *Thakur Prasad Bania* v. *State of Bihar*,[16] a case in which preventive detention orders were passed while criminal proceedings against the petitioners were in the initial stages, the Supreme Court held that where the grounds of detention are not wholly the same as the facts in respect of which the prosecution was launched and the proceedings under section 107 of the former Indian Criminal Procedure Code were initiated, the contention that the detention is in respect of the very same matter for which the prosecution was launched and that the detention is in the nature of interference with the course of justice and therefore *mala fide* is not sustainable. There is a *dictum* in the judgment in that case to the effect that:

"It may be that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution, the order of detention may amount to abuse of the statutory powers. But this does not mean that such an order is necessarily *mala fide*. Such a circumstance calls for scrutiny as to the *bona fides* of the detention order but the question of *mala fides* has got to be decided as one of fact with reference to all the circumstances of an individual case."

In *Priyatosh Mazumdar* v. *State of West Bengal*,[17] the High Court of Calcutta held that the fact that there are parallel proceedings in existence, one in court and the other by way of detention, does not by itself vitiate the order of detention. It further held that an allegation of bad faith is quite easy to make but very difficult to substantiate, and that the mere circumstance that some of the particulars in the case related to facts which formed the basis of prior unsuccessful criminal proceedings would not necessarily lead to the inference that there was bad faith on the part of the detaining authority; the court would require very much more than that to hold that bad faith was established.

Sahib Singh Dugal v. *Union of India*[18] was a case where the petitioners had been arrested for an offence under the Official Secrets Act and had been in custody for three months pending trial. The prosecution then asked for their discharge for lack of evidence and they were discharged accordingly by the magistrate and released from custody, whereupon they were immediately served with detention orders, arrested and detained. The Supreme Court of India held that the fact that it was originally intended to prosecute them under the Official Secrets Act and when the authorities were unable to get sufficient evidence to obtain a conviction they decided to drop the criminal proceedings and to order their detention by itself was not sufficient to lead to the inference that the action of the detaining authority was *mala fide*. Wanchoo J., in delivering the judgment of the court, distinguished the decision of the Supreme Court in *Rameshwar Shaw* v. *District Magistrate, Burdwan*,[19] a case of preventive detention of a person in custody pending trial, on the ground that the order of detention as well as the service of that order was made on Rameshwar Shaw when he was in jail for an indefinite period in connection with the criminal case pending against him, whereas in the case then before the court there was a significant difference in that the executive authorities had decided that the criminal case against the petitioners could not succeed for want of sufficient evidence and had applied for the discharge of the petitioners, and that it was in those circumstances that the executive authorities had decided to pass an order of detention.

Sahib Singh Dugal[18] held in effect that where it may not be possible to obtain a conviction for a particular offence, the authorities may still be justified in ordering detention of a person in view of his past activities which will be of a wider range than the mere proof of a particular offence in a court of law. This case is also of some significance on another aspect. It also held that a detention order is generally passed in the light of the evidence about the past activities of the person concerned. These past activities should, however, ordinarily be proximate in point of time to justify the detention order. In that case the petitioners had been in jail for only three months before the order of detention was passed against them, and the court held that it could not therefore be said that the conduct of the petitioners before this period of three months was not proximate enough to justify an order of detention based on that conduct. A similar decision of the Supreme Court to this effect in *Masood Alam* v. *Union of India*.[20] The position of the applicant in the matter before me would seem to be not dissimilar to that in *Sahib Singh Dugal*[18] as he was in police custody for only about four and a half months before the detention order was made against him.

In *Debu Ghose* v. *State of West Bengal*[21] the Supreme Court reaffirmed that a mere decision to drop a prosecution before passing an order of detention cannot be regarded as *mala fide*, and again in *Mohd. Salim Khan* v. *Shri C. C. Bose*[22] that the mere fact that criminal proceedings in connection with the same incidents had been adopted against the petitioner and he had been discharged by the trying magistrate does not mean that no valid order of detention could be passed against him in connection with those very incidents, or that such an order could for that reason be characterised as *mala fide*.

Borjahan Gorey v. *State of West Bengal*[23] decided that merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter 8 of the Indian Criminal Procedure Code (Chapter 7 of our Code) would not by itself debar the Government from taking action for his preventive detention.

In *S. C. Bose* v. *District Magistrate, Burdwan*[24] the Supreme Court held that the fact that the petitioner was discharged in two criminal cases for the offences for which he was arrested on October 8, 1971, and that the detention order was dated October 26, 1971, when he was still in jail custody and was served on him immediately after his discharge on October 28, 1971, would not render the detention order either

illegal or *mala fide* as the petitioner's earlier discharge in a court of law cannot preclude the detaining authority from coming to a subjective satisfaction about the necessity of the petitioner's detention on grounds which are germane and relevant. This decision is particularly pertinent in view of the fact that in the matter before me the applicant was discharged by the magistrate on August 20, 1975, but the detention order was made by the Minister on August 12, 1975, when he was still in custody on the tentative charge of murder under the Penal Code.

Mohd. Subrati v. *State of West Bengal*[25] decided that even an unsuccessful judicial trial or proceeding would not operate as a bar to a detention order or render it *mala fide*. The Supreme Court again held in *Sri Ramayan Harijan* v. *State of West Bengal*,[26] applying *Mohd. Salim Khan*,[22] that an order of detention can be validly made against a detenu after he has been discharged in a criminal case in connection with those very incidents and such an order cannot be characterised as *mala fide*. In *Abdul Aziz* v. *District Magistrate, Bardwan*[27] the Supreme Court held that the mere circumstance that the detention order was passed during the pendency of a prosecution will not vitiate the order of detention and that in conceivable cases it may become necessary to pass an order of detention in anticipation of an order of discharge or acquittal. This indeed occurred in the matter before me as I have already pointed out.

In *Masood Alam* v. *Union of India*,[20] the Supreme Court, applying *Sahib Singh Dugal*,[18] held that the fact that the objectionable activities mentioned in the grounds for detention also attract the provisions of Chapter 8 of the Indian Criminal Procedure Code (Chapter 7 of our Code relating to security for keeping the peace and for good behaviour) does not by itself make the preventive detention illegal or *mala fide* if the grounds are germane and relevant to the object of the statute in question. Merely because such jurisdiction of the courts can also be validly invoked does not by itself exclude the jurisdiction of preventive detention under the relevant statute. This case also decided there is no legal bar in serving an order of detention on a person already in custody if he is likely to be released soon thereafter and there is relevant material on which the detaining authority is satisfied that if free, the person concerned is likely to indulge in prejudicial activities contemplated by the detention law.

It is therefore abundantly clear that there is overwhelming persuasive authority, with which I have no reason to disagree (and the authorities I have adumbrated on this point are by no means exhaustive), that the order made by the Minister in respect of the applicant in the circumstances of this matter does not *ipso facto* amount to the exercise of his powers under section 4(1) of the Ordinance for ulterior purposes or purposes other than that mentioned in the detention order so as to vitiate and render it *mala fide*. The onus of proving *mala fides* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *mala fides* and not mere suspicion.

It might perhaps be open to the applicant to suggest that the circumstances surrounding his case might possibly reflect some suspicion of *mala fides* but this cannot be taken for granted or considered sufficient proof by itself. It is my considered view that the object and ambit of the Ordinance is such and the purposes specified in section 4(1) so wide as to negate any right in the applicant in the circumstances of his case to demand that the grave question of his guilt or innocence on the tentative charge of murder should be left to the court and the jury-box as the sanctuary of his life and liberty and not submerged in the amplitude of preventive detention on the basis of executive discretion and satisfaction conceived in the mind of the Minister or perhaps animated in his breast within the purview of the prescribed statutory provision on relevant grounds. Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

The contention of counsel for the applicant that the fact the detention order is dated a day earlier than the statement of grounds and allegations of fact on which the order was made and based is suggestive of *mala fides* and nullifies the order is equally untenable in my view. The prerequisite for a valid detention order is ministerial satisfaction under section 4(1) of the Ordinance and the fact that the statement in writing required to be furnished to the detenu under section 5(2)(b) is dated a day later cannot impair the validity of the order otherwise properly made or embase it for bad faith. Section 4(4)(a) requires the detenu to be informed of the grounds of his detention as soon as may be and section 5(2)(b) that he be furnished with a written statement of the grounds and allegations of fact at the time of service on him of the detention order. The Minister could hardly be satisfied if he did not have the grounds for detention before him when he made the order, and the dates appearing on the documents in question cannot in any way affect the position.

I must reiterate that it is not open to me to entertain the protestations of the applicant that he is innocent of the allegations made against him and that he is not a person who has acted or would act in any manner prejudicial to public order or resort to violence. I have already adverted to the settled principle that once the authority ordering detention is found to be duly authorised the entry into the law of the concept of subjective satisfaction renders ineffective any attempt to prove that in fact the conditions specified for the exercise of the jurisdiction have not been fulfilled, unless, as it happened in *King-Emperor* v. *Sibnath Banerji*,[28] the detaining authority by honest affidavit discloses its mind. The Federal Court held in *Karam Singh*[9] that the question whether there was reasonable cause to detain the appellant in that case was a matter of opinion and policy, a decision which could only be taken by the executive.

I have already referred to the allegation made against the Chief Police Officer, Perak, and the police generally in the applicant's affidavit. But where an order of detention is challenged on the ground of *mala fides*, what has got to be made out is not the want of

bona fides on the part of the police, but the want of *bona fides* as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police (*Lawrence D'Souza* v. *State of Bombay*[29]). Want of *bona fides* on the part of the Minister as well would therefore be essential, and in the circumstances of this case, although no affirmative or direct allegation against the Minister to this effect seems to be made by the applicant in his supporting affidavit, I find no *mala fides* established on the part of either the police or the Minister nor any evidence or proof that the latter had not applied his mind in making the detention order.

There are two other matters which I should perhaps briefly touch upon. The first is that counsel for the applicant seeks to contend in his final reply that the charge on which the applicant was originally arrested was a simple case of murder and should have been determined under the ordinary law applicable, namely, the Penal Code. However, the grounds on which the order is based and the allegations of fact on which it is made are of a broader spectrum and clearly state that the applicant is an active member of a group of inshore fishermen at Kuala Kurau and has taken part in criminal activities involving violence in a manner prejudicial to public order and in several fights with trawler fishermen in the course of which two trawler fishermen were killed on March 27, 1975. This, therefore, is not a stray or simple case of murder as, adopting the observations of Chandrachud J., in delivering the judgment of the Supreme Court of India in *Abdul Aziz*,[27] such an incident in the context of the applicant's activities as set out in the grounds and allegations of fact has serious repercussions not merely on law and order but also on public order.

The second matter is the contention that the detention order made by the Minister violates the provisions of Articles 5 and 7 of the Constitution. I find no merit or substance at all in this argument. Article 7(2) of the Constitution does not affect the position in any way as the discharge of an accused person is not an acquittal for the purposes of a plea of *autrefois acquit* (section 302(v) of the Criminal Procedure Code). I had occasion recently to deal with the effect of an order of discharge in my judgment in *Public Prosecutor* v. *Syed Abdul Bahari Shahabuddin bin Syed Abdullah*.[30]

In any event the acquittal of an accused person does not necessarily mean that he cannot be acting in a manner prejudicial to the purposes set out in section 4(1) of the Ordinance. The ordinary criminal laws of the country and the Ordinance are not substitutes for each other but are complementary. The constitutional protection against double jeopardy embodied in Article 7(2) of the Constitution and the principle of *autrefois acquit* and *convict* enacted in section 302 of the Criminal Procedure Code cannot be applicable as satisfaction under the Ordinance is not a prosecution or trial. Indeed the very essence of preventive detention is incarceration without the benefit of a prosecution or trial and with no offence proved nor any charge formulated or preferred. There is and can be no identity of offence or of prosecution between detention under the Ordinance and a conviction upon trial by a court of law. An order of detention under the Ordinance is not therefore illegal merely because it nullifies a previous order of discharge or acquittal by a court in a criminal case. (*Raman Lal Rathi* v. *Commissioner of Police, Calcutta*;[31] *Dharamdas Shyamlal* v. *District Magistrate, Ahmedabad*[32]).

I hold accordingly that the applicant has been legally detained by a valid detention order made by the Minister in the exercise of his powers under the provisions of section 4(1) of the Ordinance and that the detenu has failed to establish that it is tainted with *mala fides* or made improperly.

I should perhaps by way of postlude add that the sort of situation arising in the matter before me and in the Indian cases I have referred to are not unknown in other climes, and I mention two instances by way of illustration:

(a) In the Irish case of *In Re Michael Walsh, et al.*,[33] Walsh and three others had been brought before a criminal court and charged with murder but after the trial had proceeded for some time a *nolle prosequi* was entered against them. Subsequently they were detained in pursuance of orders made under certain emergency legislation directing them to be brought before a military court established under one of such orders to be tried for the same murder. They applied for orders of *habeas corpus* and prohibition and challenged the validity of the order directing their trial before the military court on the grounds that it was *ultra vires* and that they had already been charged before a criminal court and a *nolle prosequi* entered against them on the same charge. The Supreme Court of Ireland affirmed the order of the High Court refusing the applications for *habeas corpus* and prohibition.

(b) In England, Mrs. Nicholson, M.B.B.S., the wife of Admiral Wilmot Nicholson, was detained on May 26, 1940, under regulation 18B of the Defence (General) Regulations, 1939, but her case was not heard by the Advisory Committee until October of that year. On February 18, 1941, she was tried at the Old Bailey before a judge and jury sitting in camera, and after a trial lasting 5 days she was acquitted. She was taken straight from the court back to detention. She applied to go again before the Advisory Committee, but her case was not reconsidered until October, 1941, when she was informed by the Advisory Committee that she was held in detention on the allegations of which she had been acquitted. It was not until January 11, 1942, that she was informed by the Home Secretary that she would not be released. Her case was fully discussed in the House of Commons on July 21, 1942.* She was not released until September, 1943.

I mention these two instances not by way of justification but only to show that the exigencies of the situation have sometimes necessitated executive action on these lines in other jurisdictions as well.

In the result the application fails. *Habeas corpus* is refused. The five other kindred applications of the same nature must in the event abide by the determination in this matter.

Application fails.

Habeas corpus refused.

Solicitors: *R. Rajasingam & Co.*

* H.C. Deb., Vol. 381, cols. 1451 ff.